

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 February 2013

**Public Authority:** North West Leicestershire District Council

**Address:** Council Offices  
Coalville  
LE67 3FJ

#### **Decision (including any steps ordered)**

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1. The complainant requested information from North West Leicestershire District Council ("the council") relating to the preparation of a report about a restructure of senior management. The council provided some information and sought to withhold other information using the exemptions under section 36(2)(b)(i) (ii) and (c), 40(2) and 41(1) of the Freedom of Information Act 2000 ("the FOIA").
2. The Commissioner's decision is that the council correctly withheld information using section 36(2)(b)(i) and (ii) of the FOIA, the exemption relating to prejudice to the candour of advice and deliberations.
3. The Commissioner does not require any steps to be taken.

#### **Background**

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4. The council explained to the Commissioner that an opportunity arose to consider the management structure at the council in 2010 when a number of senior members of staff announced their decision to resign. The need to restructure was particularly pressing in view of the financial pressures being faced by the council because of the economic outlook. The process of developing the future management restructure was an internal process involving the Chief Executive and other senior officers and consultants which ultimately involved a formal consultation process. Subsequently a report to full council was made on 28 September 2010 outlining the Chief Executive's view of what the management requirements of the council were. The restructure was implemented in early 2011. A copy of that report, to which this request relates, was

published on the council's website and can be accessed via the following link:

[http://www.nwleics.gov.uk/files/documents/facing\\_the\\_challenge\\_senior\\_management\\_structure/Facing%20the%20Financial%20Challenge%20%E2%80%93%20Senior%20Management%20Structure%20Report%20-%20Council%2028%C2%A0September%202010.pdf](http://www.nwleics.gov.uk/files/documents/facing_the_challenge_senior_management_structure/Facing%20the%20Financial%20Challenge%20%E2%80%93%20Senior%20Management%20Structure%20Report%20-%20Council%2028%C2%A0September%202010.pdf)

## **Request and response**

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5. On 13 January 2012, the complainant wrote to the council to request information in the following terms:

*"Copies of supporting information (CLT papers and minutes; emails, reports and written advice from HR; emails, reports and written advice from the interim corporate director including correspondence with the chief executive) used in the preparation of the report to Council 28/9/10 – "Facing the financial challenge-senior management restructure".*

6. The council responded on 10 February 2012 and said that it had supplied the information that it was able to provide. The council also said that it had decided to withhold some information using the exemptions under section 36, 40 and 41 of the FOIA.
7. The complainant requested an internal review on 17 February 2012.
8. The council completed its internal review on 29 February 2012 and said that it wished to maintain its position that the information was exempt.

## **Scope of the case**

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9. On 7 June 2012, the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the commissioner to consider whether the council had correctly refused to provide the information using the exemptions cited.

## Reasons for decision

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### **Section 36(2)(b)(ii) – Prejudice to the effective conduct of public affairs**

10. This exemption concerns prejudice to the effective conduct of public affairs. Sections 36(2)(b)(i) and (ii) are concerned specifically with prejudice to the provision of advice and the free and frank exchange of views for the purposes of deliberation. Unlike other exemptions in the FOIA, it is engaged if a qualified person at the public authority confirms that it is their opinion that the exemption is engaged and that opinion is a reasonable one.
11. In order to establish whether the exemption was engaged, the Commissioner will:
  - Establish that an opinion was given
  - Ascertain who the qualified person was
  - Ascertain when the opinion was given
  - Consider whether the opinion was reasonable
12. The Commissioner confirmed that the council's qualified person (the monitoring officer) had given her opinion that the information was exempt. The council said that its refusal notice, signed by the monitoring officer, represented the record of the opinion from the time. Having considered the refusal notice, the Commissioner was satisfied that the council's qualified person had given an opinion. Although sections 36(2)(b)(i) and (ii) were not specifically cited at the time, the qualified person subsequently clarified that these were the sections being relied upon in a record sheet provided to the Commissioner.
13. For clarity, the qualified person also cited section 36(2)(c) however this has not been considered any further by the Commissioner since the arguments made appeared to be the same as those relied upon under section 36(2)(b) and this part of the exemption is only relevant if the arguments are different.

### **Was the qualified person's opinion reasonable?**

14. The Commissioner bases his understanding of the word "reasonable" on its plain meaning. The definition in the Shorter English Dictionary is "in accordance with reason; not irrational or absurd". The opinion only has to be a reasonable one and this part of the exemption is therefore not a high hurdle. An opinion that a reasonable person could hold is a reasonable opinion. It does not have to be the only reasonable opinion that could be held, or the 'most' reasonable opinion. For clarity, the

Commissioner does not have to agree with the opinion. He only has to recognise that a reasonable person could be of that opinion.

15. The qualified person confirmed that prior to providing her opinion she had seen all the relevant information. Having reviewed the information, she formed the following opinion:

*"It was and is my view that in the context of the consideration of the management restructure that could (and in fact did) result in redundancies and/or the loss of benefits to individual members of staff, members of staff both at a senior management level and more junior staff were to be encouraged to have free and frank discussions about the possible impact of decisions that were to be taken on the management restructure as a part of a formal consultation process in accordance with the Council's internal Human Resources procedures. In my opinion if officers thought that it was possible that their views were likely to be made public at some point in the future then they would be inhibited in their advice or response to the consultations, particularly where they were likely to be directly line-managed under a system that they had expressed objection to".*

16. The exemption specifies that the prejudice to the provision of advice or the free and frank exchange of views has to meet the threshold of "likely" or "would be likely". It has been established in various decisions of the Information Tribunal that the word "would" denotes a level of risk that is "more probable than not" and "would be likely to" means that the level of risk is less but still real and significant and certainly more than a remote possibility. Although it was not clear from the initial response provided by the council which threshold was considered to apply in this case, the council subsequently clarified that the qualified person's view was that the prejudice "would be likely to" occur.
17. The arguments put forward focus on the notion of "a chilling effect", a term that has become well-known in the context of this particular exemption. As discussed in the Commissioner's published guidance:

*"'Chilling effect' arguments are directly concerned with the argued loss of frankness and candour in debate/advice which it is said would result from disclosure of information under FOIA".*

18. The Commissioner considered the arguments presented by the qualified person and the wider circumstances of the case. He was satisfied that the qualified person's opinion was a reasonable one in view of the nature of the information and the context in which these discussions were taking place. The Commissioner can accept that the discussions took place in a confidential setting and concerned a difficult and sensitive

issue in general. He can accept that it was a reasonable opinion that disclosure of information of this nature would be likely to result in some staff being less candid in future consultations about staff restructures. He was satisfied that in view of these considerations, it was a reasonable opinion that disclosure of the information would be likely to hinder the council's ability to receive advice and consider the issues involved in a free and frank manner for the reasons described above. The Commissioner therefore accepts that sections 36(2)(b)(i) and (ii) were engaged in this case.

## **Public interest**

19. Having concluded that sections 36(2)(b)(i) and (ii) were engaged, the Commissioner went on to consider the public interest test. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
20. In *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013), the Information Tribunal provided some general principles about the application of the public interest test in section 36 cases. Please see paragraphs 87 to 92 of that decision for further details at the following link:

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i81/Guardian%20Brooke.pdf>

## **Public interest arguments in favour of disclosing the requested information**

21. The "default setting" of the FOIA is in favour of disclosure. This is based on the underlying assumption that the disclosure of information held by public authorities is in itself of value. Disclosure of information serves the general public interest in promotion of better government, through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.
22. More specific to this case, there is a public interest in the council being accountable in respect of the decisions that it has taken to save public money. This is even more pressing given the current economic climate and the squeeze on local authority services. Disclosure of the information would help the public to understand more about the way the council arrived at the decisions that it did in this particular case.

### **Public interest arguments in favour of maintaining the exemption**

23. The council argued that the public interest in maintaining the exemption outweighed the public interest in disclosing the information in the circumstances of this case. As already discussed, the Commissioner accepts that the qualified person's opinion was reasonable that disclosure at the time of the request would be likely to have caused a "chilling effect" by affecting the candour of the exchanges. It would not be in the public interest to prejudice the council's ability to consider properly the best way to achieve savings in the future. This could result in delays or less well considered decisions being made regarding the use of public money and the way in which the authority operates.

### **Balance of the public interest arguments**

24. While the Commissioner accepts that there is a public interest in the council being transparent about its decisions relating to staff restructures, there remains the question of degree. He notes that by the time of the request, the council had published its full report to council dated 28 September 2010. This outlined in some detail the background to the whole matter, the particular recommendations that were made and details about why those changes were considered to be required. The Commissioner also notes that the report outlined details about the consultation process and included comments and concerns expressed about the proposals and what the council's response to those concerns was.
25. Whether the public interest favours disclosure of more precise details about the council's discussions that led to the particular proposals depends on the nature of the information and factors such as the severity of prejudice to the candour of the council's discussions. It is worth highlighting for clarity that although the Commissioner must give weight to the qualified person's opinion once he has accepted its reasonableness, it is open to the Commissioner to consider the severity, frequency and extensiveness of any prejudice that would occur. This was one of the general principles established in the case of *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013).
26. As part of his overall analysis, the Commissioner considered the timing of the request. He notes that the earliest information is dated 20 May 2010 and the oldest is dated 16 September 2010. The request was made on 13 January 2012. Therefore all of the information was more than a year old by the date of the request which does to some extent lessen the severity of any prejudice that would be likely to occur. Chilling effects are likely to be more severe when discussions are still on-going as opposed to when matters have essentially been resolved.

However, this does not in itself mean that the chilling effect could not still be sufficiently severe. Whether it is or not depends on the nature of the withheld information and other relevant circumstances. The Commissioner has also taken into account that the restructure would have needed time to be implemented fully and the new structure would be likely to be in place for some time, so by the time of the request, the issues involved would still be relatively recent.

27. Turning now to the specific information that has been withheld in this case, the Commissioner notes that it may be described as falling broadly within the following categories:
- Emails between staff members connected to the restructure and other documents which are of a fairly general nature.
  - Emails and documents passed between staff members that discuss more specific detail about the planned restructure, including those that formed part of a consultation exercise
  - A number of drafts of the main report from September 2010
28. The severity of the prejudice that would be caused by the disclosure of information often varies in degree in any given case. In relation to the withheld information falling within the first broad category above, the Commissioner considered that the prejudice would be significantly less than that which would result from the disclosure of other, more detailed information. While the prejudice would not be as severe, the Commissioner must have regard to the qualified person's opinion that disclosure of any of this information would be likely to cause a chilling effect to the candour of the council's communications on such matters. In view of that, the Commissioner considered how much disclosure of the particular information would usefully contribute towards the public's understanding of the issues involved. The Commissioner has had particular regard to the detailed report that the council had published about its proposals for the senior management restructure in September 2010. Having considered the nature of the withheld information that was of a more generic nature, the steps taken by the council to be transparent about its recommendations, and the overall sensitive context of the discussions, the Commissioner agrees with the council that the public interest did not favour disclosure of any of the information falling within this area.
29. In relation to other information that provides more specific details about the proposals being considered by the council, the Commissioner took the view that the level of prejudice that would be caused to the candour of council discussions in the future would be sufficiently severe. The Commissioner did not consider that disclosure of all of the exchanges about the proposals would be proportionate in the circumstances of the



case, having particular regard to the sensitive overall nature of the discussions and the other circumstances such as the timing of the request and the information that was already available. As already acknowledged, there is a public interest in understanding more about how decisions are made by public authorities and not purely what the outcome is. On the other hand, disclosure of internal deliberations may ultimately undermine an authority's chosen position, or lead to unproductive questioning of that decision, causing a chilling effect to future exchanges. Whether that is appropriate or not will depend on the complete context.

30. The Commissioner notes that the council's report on the matter was detailed and went beyond a mere description of what the outcome was. It outlined why the decisions had been made and details about the consultation as well. Furthermore, the Commissioner notes that some of the withheld information contains sensitive comments on the roles of individual staff members (for example, discussions over job "slotting" and at risk posts) and there is also a significant amount of the information that includes free and frank consultation responses given by multiple members of the council's staff on what is, clearly, a sensitive topic. While the Commissioner notes that some of the responses came from senior staff at the council, who can generally expect a greater level of transparency, he did not consider that disclosure would be proportionate in view of the nature of the information and the context in which the responses were given.
31. The Commissioner notes that the responses were often very detailed and represented the personal views of those individuals. Some of the responses were presented in the form of a detailed report from the officers concerned. From the face of the documents, it appears that detailed commentary was invited from these individuals in a confidential setting about a sensitive subject, and assurances were given about that confidentiality. The Commissioner accepts that the consequences of disclosing information of this nature could have a very severe impact on the candour of future staff exchanges about restructures. If the information was disclosed, the Commissioner can appreciate that staff would be likely to be much more reluctant to comment for fear of facing criticism or causing distress or conflict amongst colleagues. This is particularly so where comments may put jobs at risk.
32. The withheld information also contained a number of drafts of the main report dated 28 September 2010. The council explained to the Commissioner that during its process of deliberation and consultation about the management restructure, a number of drafts of the main report were produced as the proposals developed. The council said that these drafts were intended for internal use only and effectively



represented a "work in progress" charting the restructure as it progressed.

33. The Commissioner has considered the drafts and he notes that a significant amount of the information contained in the drafts is actually the same as that already published. For clarity, the Commissioner is not concerned with any information that is already in the public domain since there is no merit in ordering the council to disclose that information. It is clear though that there were some changes to the report as the matter progressed and these are largely denoted by a number of tracked changes on the documents. However, having considered the nature of the changes, the Commissioner did not consider that they are revealing of any particular or obvious issues that should be brought to the attention of the public despite the risk of causing a chilling effect to the council's internal deliberations. In the case of more minor changes, while the severity of the chilling effect would be limited, there is a limited amount of public interest in revealing each and every change made to the report. In the Commissioner's view, it is more important to avoid the risk of the chilling effect that the qualified person has indicated would occur. The latter also applies in the Commissioner's view to any more substantive changes, given the sensitive context in which these proposals were being made.
34. Overall, the Commissioner was satisfied that the public interest in maintaining the exemption outweighed the public interest in disclosing it in all the circumstances of the case. As indicated in the analysis above, while the Commissioner considered that the level of chilling effect that would be likely to occur varies depending on the nature of the particular information, he was satisfied that it was more important to preserve the council's ability to have completely free and frank discussions about restructures than it is to disclose all the details of the deliberative process that led to the council's recommendations. The Commissioner is mindful of the strain that has been placed on all local authorities because of the financial deficit and it is, against this background, particularly important that local authorities are not constrained unnecessarily in their ability to have the candid discussions that may be necessary to make savings. In view of the information that had been published and the steps taken by the time of the request, the Commissioner considers that the council has been reasonably transparent about the issues involved. There were no particular circumstances apparent to the Commissioner that would warrant the level of transparency being sought by the complainant in this case. Given the sensitivities involved, the Commissioner took the view that the disclosure sought would be disproportionate to any legitimate public interest.

35. As the Commissioner was satisfied that the information had been correctly withheld using sections 36(2)(b)(i) and (ii), he did not consider that it was necessary to consider whether the council had also correctly applied the additional exemptions cited under section 40(2) and 41(1) of the FOIA.

## Right of appeal

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36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Andrew White**  
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